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No. 06-219

IN THE

Supreme Court of the United States

CHARLES WILKIE, ET AL.,

Petitioners,

v.

HARVEY FRANK ROBBINS,

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE RESPONDENT

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STATEMENT OF THE CASE

Petitioners in this case, officials of the United States Bureau of Land Management (BLM), engaged in a campaign of harassment and coercion designed to force respondent, a Wyoming rancher, to give the Government a property interest in his land without just compensation. The principal question before the Court is whether that brazen attempt to circumvent both the limitations on petitioners' regulatory authority and the requirements of the Fifth Amendment violated respondent's clearly established rights under the Constitution and state and federal statutes prohibiting extortion under color of official right.

1. Although the BLM is granted substantial responsibilities and powers over the management of *federal* land (Pet Br. 2-3), its power over neighboring *private* property is strictly constrained by the Constitution, legislation and regulation. In particular, the BLM is authorized to acquire access to private property in just four ways.

First, the agency may acquire property through purchase from a willing seller, or by donation or exchange. *See* 43 U.S.C. §1715(a).

Second, the agency may take private property through eminent domain, but "only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary to serve such purpose." *Id.* If the BLM determines to exercise this power, it must request the Attorney General to commence a condemnation proceeding in district court and the land owner is entitled to challenge whether the statutory conditions have been met. *See* 40 U.S.C. § 3113; *United States v. 82.46 Acres of Land*, 691 F.2d 474, 477 (10th Cir. 1982).

Third, by regulation, the BLM has claimed the authority to require an "applicant for a right-of-way" across federal land "as a condition of receiving a right of way, to grant the United States an equivalent right-of-way that is adequate in

duration and rights." 43 C.F.R. § 2801.1-2 (2004). Under this regulation, the BLM has no authority to demand an easement from a person who is not an "applicant for a right-of-way" – for example, a person whose prior right-of-way has been cancelled.

Fourth, a further regulation provides that a permit for grazing on federal lands "may include . . . [a] statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public land." 43 C.F.R. § 4130.3-2(h). This provision does not authorize the BLM to obtain a property interest – such as an easement or right-of-way – in exchange for a grazing permit; only a right of limited access is allowed. Nor does the provision authorize the BLM to demand access for non-governmental entities or for purposes unrelated to the management or protection of public lands.

2. Respondent Harvey Frank Robbins is the current owner of the High Island Ranch, a cattle and guest ranch located in Hot Springs County, Wyoming. Pet. App. 2a. The ranch stretches for approximately 40 miles, a patchwork of mostly contiguous parcels of land, occasionally interspersed with property owned by other individuals, the State of Wyoming, or the federal government. *See* J.A. 136 (Map). The western portion of the ranch extends up the slope of a mountain range, eventually reaching the border of the Shoshone National Forest near the origination of the Rock Creek. The upper Rock Creek area contains both great natural beauty (admired by hikers and environmentalists) and possible mineral resources (valuable to private land owners and mining companies). C.A. Supp. App.[1] at 561, 577-78, 600-06. Although the area is accessible from the north and south, environmental groups and recreational users have long

[1] "C.A. Supp. App." refers to the Tenth Circuit supplemental appendix, containing respondent's summary judgment evidence.

desired improved access to the area. J.A. 136; C.A. Supp. App. 590-93, 605-06. In the late 1980s, federal officials from the BLM and the U.S. Forest Service began meeting with officials of the Wyoming Game and Fish Department in an attempt to satisfy that public demand. C.A. Supp. App. 575-89, 594-96, 598-604. Their efforts soon came to focus on obtaining public access to the South Fork Owl Creek Road, which runs through the High Island Ranch. *Id.* The difficulty was that neither the State nor the Federal Government owned the road as it passed through the Ranch or had any legal authority to demand that the public be allowed to use it.

In early meetings, the Forest Service recommended to the BLM that it negotiate with the then owner of the Ranch, George Nelson, to purchase a public easement from him. C.A. Supp. App. 575-78, 600-02. In response to mounting public and political pressure, petitioner Joseph Vessels, then Area Manager for the local BLM office, contacted Nelson several times in 1993, seeking a public easement across the Ranch. C.A. Supp. App. 607-15. Rather than offering to purchase the easement, as suggested by the Forest Service, Vessels offered that in exchange for the easement, the BLM would allow Nelson to maintain a portion of the road as it ran across BLM land. *Id.* at 609-12. Nelson already had a right to use the road to access his property but needed BLM permission to use the road for commercial purposes or to maintain it, and the road had fallen into serious disrepair, *id.* at 794. Nelson took the offer under consideration.

While Nelson was reviewing the offer, Vessels reported to various constituencies that he was in the process of securing public access. C.A. Supp. App. 616. Nelson subsequently informed Vessels that he would agree to give the BLM an easement, but would not agree to allow public access, as it would interfere with the operation of his guest ranch, which offered customers the opportunity to participate in authentic, traditional cattle drives across lands uninterrupted by the traffic and intrusion of modern life. *Id.*

at 613-15. Vessels agreed to that condition and prepared the documents. J.A. 94-96.

Although existing regulations permitted the BLM to require an "equivalent" easement from Nelson in exchange for a right-of-way across BLM land, 42 C.F.R. § 2801.01-2 (2004), the easement and right-of-way Vessels prepared were markedly unequal. J.A. 90-93, 97-103. The easement to the BLM was a recordable, irrevocable, twenty-year easement allowing the BLM and its licensees "full use" of the road, subject only to certain restrictions related to oil and gas development. *Id.* at 90-91. In contrast, the right-of-way provided to Nelson required him to pay the BLM "fair market value rental" and restricted Nelson's use and maintenance of the road to certain times of the year. *Id.* at 99. And while the easement allowed the BLM to permit mining companies to use the road to access federal land, the right-of-way did not permit Nelson to use the federal portions of the road for that same purpose. *Id.* at 102. Nelson nonetheless signed the easement on March 18, 1994. J.A. 92-93. However, for reasons undisclosed in the record, the BLM failed to record the easement. Pet. App. 2a.

While Nelson was negotiating to obtain the right-of-way, he was also looking to sell the Ranch. Although the Wyoming Game and Fish Department had hoped to acquire the property, J.A. 44,[2] Nelson eventually agreed to sell the Ranch to respondent, executing a sales contract on March 6, 1994. C.A. Supp. App. 569-73. It is uncontested that respondent was unaware of the BLM's easement when he completed the purchase and recorded his warranty deed, thereby extinguishing the unrecorded easement. Pet. App. 2a.

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[2] J.A. 44 is respondent's Third Amended Complaint. *See also* Pet. App. 37a (district court finding that "Robbins has provided ample [summary judgment] evidence to support the allegations in his third amended complaint").

Petitioners soon discovered their mistake. Not only had the plan to purchase the Ranch for public use been frustrated by the sale to respondent, but petitioners' limited success in obtaining at least some access across the Ranch had been lost through their failure to record the easement. Vessels immediately contacted respondent, still living in Alabama. He demanded that respondent sign a new easement, telling him "this is what you are going to do" and "you don't have any choice." C.A. Supp. App. 325-26. Respondent said he would be happy to negotiate a deal once he moved to Wyoming but was unwilling to capitulate to unilateral demands. *Id.* Petitioner Vessels informed respondent that "the Federal Government does not negotiate." *Id.*[3]

Respondent's refusal to grant the easement infuriated petitioners. One of their BLM coworkers, Edward Parodi, later testified that BLM employees were soon referring to respondent as that "the rich SOB from Alabama [who] got" the property. He also testified that officials were "quite upset," predicting that "this was going to be one heck of a fight." J.A. 121-22.

Respondent nonetheless refused to capitulate. He had purchased the Ranch free and clear, unaware of any easement attaching to the Ranch (which obviously would have affected its value) precisely because petitioners failed to afford him notice by recording the easement. J.A. 45. Respondent was not an "applicant for a right-of-way" who could be required by the BLM to provide an easement "as a condition of

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[3] Vessels also demanded that respondent permit the BLM to conduct a survey across his property to ascertain the scope of the easement. J.A. 47. Respondent refused, reasoning that there was no point in allowing a survey until he determined whether he would grant the easement. C.A. Supp. App. 326. Vessels ordered that the survey be conducted anyway, trespassing on respondent's property and later boasting that he had conducted the survey despite respondent's protest. *Id.*

receiving a right-of-way," 43 C.F.R. § 2801.1-2 (2004), since it was Nelson, and not respondent, who had applied for the right-of-way from petitioners. And nothing in the regulations or the Nelson right-of-way agreement required respondent to grant the BLM a new easement whenever the prior easement expired through no fault of his. J.A. 97-103.

Petitioners nonetheless persisted in asserting that respondent was obliged to execute a new easement, and respondent continued to refuse. Parodi testified that as time went on, petitioners became increasingly hostile toward respondent. *Id.* at 122-27. As a result, Parodi explained, petitioners soon settled on a scheme to "get . . . [respondent's] permits and get him out of business." *Id.* at 125-26.

One of petitioners' first steps was to cancel respondent's right-of-way across BLM land in July 1995. C.A. App. 40-43.[4] Although the cancellation was harmful, petitioner found ways to continue to operate his Ranch without it. After the right-of-way was cancelled, petitioners had no plausible argument that respondent had a legal duty to give the BLM an easement in exchange for a right-of-way that he no longer had. Nor could they rely on his grazing permits to demand an easement, as these permits allowed the BLM only "administrative access," not a property interest like an easement. 43 C.F.R. § 4130.3-2. Petitioners nonetheless continued to demand that respondent give them an easement and, when he refused, undertook a campaign of harassment and intimidation to punish him and coerce him into acceding to their demands:

False Criminal Charges. In a 1997 meeting, petitioner Barnes repeated his demand that respondent give the BLM an easement. J.A. 56. When respondent refused, Barnes immediately summoned petitioner Miller, a BLM law enforcement officer, who proceeded to interrogate respondent

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[4] "C.A. App." refers to the appendix to the appellant's brief in the Tenth Circuit.

and accuse him of the crime of interfering with a federal employee in a prior incident. *Id.* at 348-49, 499-500, 850-53. Based on petitioners' allegations, respondent was charged with violating 18 U.S.C. § 111. *See United States v. Robbins*, 179 F.3d 1268, 1269 (10th Cir. 1999). Having endured the expense and humiliation of a public criminal prosecution, respondent was acquitted by a jury after less than one-half hour of deliberations. *Id.* After the verdict, "jurors stated that they were appalled at the actions of the government." C.A. Supp. App. 852.[5]

Harassment. Petitioners also interfered with the operation of the Ranch. For example, petitioners would closely follow the guest cattle drives in BLM vehicles and openly videotape them, ruining the guests' authentic cattle drive experience. J.A. 52; C.A. Supp. App. 331, 424-25, 504-05. On one occasion, petitioners Barnes, Miller and Vessels trespassed on respondent's property and parked a BLM vehicle in the path of the cattle drive, then proceeded to videotape respondent's guests from a hilltop, even as they sought privacy to go to the bathroom. *Id.* at 505-08. That same day, petitioners broke into his upper guest ranch lodge, leaving it in disarray. *Id.* at 314-20; J.A. 52.

False Administrative Charges And Selective Enforcement of Regulations. Prior to his purchase of the

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[5] Respondent applied for attorney's fees under the "Hyde Amendment," which required him to prove that the "position of the United States was vexatious, frivolous, or in bad faith." Pub. L. 105-119, 111 Stat. 2440, 2519 (1997). The district court declined to decide whether there was probable cause for the prosecution, but held that respondent had failed to make the required showing. *United States v. Robbins*, No. 97-CR-0092-B, slip op. 9-13 (D. Wyo. Apr. 8, 1998). Notably, the court did not pass on whether *petitioners'* allegations, which instigated the prosecution, were frivolous or in bad faith. *Id.* (deciding only whether the position of the United States, as prosecutor, was baseless, vexatious or in bad faith).

High Island Ranch, respondent owned a similar ranch in Montana that was also interspersed among federal lands. *Id.* at 324, 456-58. During the ten years he owned the property, respondent maintained an exemplary record with the Montana BLM office, *id.* at 324, a record he replicated with respect to the grazing permits issued by the Forest Service in Wyoming, *id.* at 499.

Upon his refusal of petitioners' demand for an easement, respondent's record with the Wyoming BLM promptly assumed a different hue. Petitioners engaged in a prolonged campaign of false administrative charges and selective enforcement of agency regulations in an attempt to build a case for revoking the grazing and special recreational use permits upon which respondent depended to make economic use of his property. J.A. 72-73. Parodi thus testified that petitioners instructed him to "look closer" and "investigate harder" in an effort to catch respondent in grazing permit violations, and that "if I could find anything, to find it." J.A. 127-29, 134.

While Parodi was reluctant to follow this directive, petitioners were not. For example, petitioners charged respondent with trespass for maintaining a BLM road leading to his property after the BLM had failed to maintain it in usable condition, even though they had allowed the prior owned of the Ranch to do the same thing without penalty. *Id.* at 328-29, 794-802. Petitioners also knowingly issued numerous livestock trespass citations against respondent but not against his neighbors for identical conduct. J.A. 50. For example, in 1998, respondent's and a neighboring rancher's bulls tore down a common fence during a fight, allowing livestock from each range to cross briefly into the adjacent property. C.A. Supp. App. 383-85, 418, 911-924. Well aware of these circumstances, petitioners nonetheless issued trespass decisions against respondent but not his neighbor. *Id.* In fact, from respondent's purchase of the Ranch in 1994 through 2003, petitioner Barnes issued a total of 158 grazing

trespass notices to ranchers throughout the district but rendered final decisions sanctioning the trespass only thirteen times — all against respondent. *Id.* at 1563-69. Furthermore, petitioners frequently charged respondent with "willful" trespass – a charge carrying more substantial penalties and possible collateral consequences than the ordinary charge of "nonwillful" trespass appropriate when cattle simply wander onto federal land, *see* 43 C.F.R. §§ 4150.3, 4170.1-1 – even when they knew the violation was accidental or caused by a third party. J.A. 49-50.

Respondent initially attempted to challenge many of the false or selective charges through the BLM administrative process. But the cost of defending against the charges necessarily exceeded the fines involved by orders of magnitude,[6] the appeals took years to resolve,[7] and petitioners interfered with his attempts to defend himself in those proceedings.[8] Moreover, the Interior Board of Land Appeals (IBLA) – the body responsible for hearing land management

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[6] By 2002, Robbins had been assessed a total of $12,620 in penalties, C.A. Supp. App. 1564-69, but had spent hundreds of thousands of dollars in costs and attorney's fees attempting to defeat the charges.

[7] For example, some of the first appealable trespass decisions were issued in 1997, C.A. Supp. App. 1565, but were not subject to a hearing until 2001, and a decision was not issued by the administrative law judge until 2006. *See* Decision, *Robbins v. BLM*, WY-01-98-1 (July 24, 2006).

[8] When, for example, Robbins attempted to obtain information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to prepare for a hearing, petitioner Barnes refused to produce the documents within the time permitted by the Act, providing them instead on the first day of the hearing. C.A. Supp. App. 1174-87, 1201. Although the production mooted Robbins' pending FOIA suit, the district court characterized the BLM's conduct as "arrogance of authority," "troubling," and reflecting "indifference to citizens' legitimate interests." *Id.* at 1204.

appeals from BLM decisions, 43 C.F.R. § 4.1(b)(3) – ultimately held that it lacked jurisdiction to hear respondent's claim that petitioners' regulatory actions were part of an unconstitutional pattern of extortionate harassment. *Frank Robbins*, 170 I.B.L.A. 219, 227 (2006). The escalating cost and lack of any adequate remedy eventually led respondent to abandon attempts to seek administrative relief.[9]

Starting in 1995, petitioners Wilkie and Leone also began a campaign to limit, and then eventually revoke, respondent's right to cross BLM lands during his guest cattle drives, by falsely accusing him of violating the terms of his special recreation use permit ("SRUP"). Tellingly, when petitioner Leone – who was responsible for issuing reports on respondent's compliance with the SRUP terms – retired in 1999, the reported violations immediately ceased. *Compare* C.A. Supp. App. 684-685, *with id.* at 985. Based on Leone's replacement's positive SRUP evaluation, petitioners Wilkie and Barnes initially informed respondent that his SRUP was in "good standing" and should be renewed. *Id.* at 986. But a few months later – one week before respondent's guest cattle drives were scheduled to start, *id.* at 352 – Barnes issued a decision denying the SRUP. The denial was based not upon respondent's record of compliance with the SRUP conditions, but rather upon the accumulated grazing and other charges issued by petitioners. *Id.* at 987-89.

Attempted Incitement Of Others To Take Adverse Actions. Not content with petitioners' own efforts at coercion and retaliation, petitioner Wallace contacted Preston Smith, a manager for the Bureau of Indian Affairs ("BIA").[10] *Id.* at 358-59. Smith testified that Wallace "put a lot of pressure"

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[9] The BLM ultimately revoked respondent's grazing permits because of the repeated trespass charges petitioners filed against him over the years. J.A. 51-52, 57.

[10] Respondent owns and grazes private land adjacent to the Wind River Indian Reservation.

on him to impound respondent's cattle, asserting that he was "a bad character" and that "something needs to be done" with him. *Id.* at 359. Smith rejected the request, explaining that the BIA had no problems with respondent. *Id.*

3. After enduring many years of such abuse and finding his livestock and guest ranching businesses seriously damaged by petitioners' harassment, respondent sued them in their individual capacities. Among other things, respondent sought relief pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his Fifth Amendment property rights. Pet. App. 1a-2a. He further alleged that petitioners had engaged in a pattern of extortion and blackmail in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68.[11]

The district court initially granted petitioners' motion to dismiss on the grounds that respondent had failed to plead sufficiently specific damages under RICO, and that his *Bivens* claim was precluded by the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706, and the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346. *Id.* at 3a. On appeal, the Tenth Circuit reversed, holding that respondent adequately pled RICO damages, *id.* at 79a-80a, and rejecting petitioners' claim that the FTCA precluded respondent's *Bivens* claim, *id.* at 83a-84a. As for the APA, the court noted that the Act "contains no remedy whatsoever for constitutional violations committed by individual federal employees unrelated to final agency action." *Id.* at 81a-82a. The court held that "several of Appellant's allegations of Defendants' intentional misconduct are unrelated to any final agency action and are therefore properly within the scope of a *Bivens* claim." *Id.* at 82a.

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[11] Respondent also made claims, not at issue here, under the Fourth Amendment and the Due Process Clause. Pet. App. 3a-4a.

On remand, petitioners did not ask the district court to decide which of respondent's allegations on the Fifth Amendment count were precluded by the APA under the Tenth Circuit's standard, *id.* at 26a, but simply moved to dismiss on qualified immunity grounds, *id.* at 55a. The district court denied the motion in relevant part, holding that the complaint adequately pled violations of clearly established rights under RICO and the Fifth Amendment *Id.* at 61a-62a, 72a-74a. Petitioners did not appeal. Instead, after extensive discovery, they moved for summary judgment, re-asserting their defense of qualified immunity. *Id.* at 33a. The district court denied the motion, concluding that respondent had amply substantiated the allegations in his complaint. *Id.* at 37a. Faced with the same facts as it had assumed in ruling on the motion to dismiss, the district court held that its earlier legal determination – that the rights violated were "clearly established" – was law of the case and denied the motion for summary judgment. *Id.* at 34a-36a.

4. Petitioners appealed again, and the Tenth Circuit affirmed. *Id.* at 26a. The court first held that respondent had a clearly established Fifth Amendment right to exclude the government from his private property. *Id.* at 12a. The court then concluded that "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a. "Thus, Robbins has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power." *Id.* at 14a. The court further concluded that petitioners' actions violated that clearly-established constitutional right: "If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government and government officials will be more inclined to obtain private property by means outside the Takings Clause. The

constitutional right to just compensation, in turn, would become meaningless." *Id.* at 14a-15a.

The court also rejected petitioners' assertion of qualified immunity from respondent's RICO claims. The court noted that petitioners had not contested that respondent "sufficiently alleged [they had] engaged in a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402." *Id.* at 17a. Instead, they argued that, "[b]ecause [they] had legal authority to require Robbins to grant the BLM a right-of-way in exchange for his right-of-way on federal lands, . . . their conduct in seeking the right-of-way does not constitute a clearly established predicate act under either the Hobbs Act or Wyoming law." *Id.* The court rejected that assertion, holding that even if petitioners had a general legal right to require respondent to provide an easement in exchange for his right-of-way across federal land, they could not achieve that lawful end through the unlawful means of extortion. *Id.* at 18a-20a. The court then rejected petitioners' claim that their actions were not extortionate, but were simply aggressive exercise of their regulatory duties. That claim, the court held, depended on disputed questions of fact that could not be resolved on summary judgment. *Id.* at 21a. The court also held that petitioners' conduct independently violated Wyoming's extortion statute. *Id.* at 22a-25a.

Finally, the court rejected petitioners' argument that the APA precluded respondent's *Bivens* claim. The court reiterated its holding from the first appeal that the APA precluded respondent's Fifth Amendment claim only to the extent it was based on "individual action leading to a final agency decision." *Id.* at 25a. The court then declined petitioners' request that it "determine which allegations remain and which are precluded," explaining that petitioners "did not raise this issue in their motion for summary judgment." *Id.* at 25a-26a.

SUMMARY OF ARGUMENT

Petitioners wanted an easement across respondent's land for the BLM and its assigns. When he would not give it to them, they cancelled his right-of-way across surrounding federal property, thereby extinguishing the only plausible basis they ever had for thinking respondent was required to give the Government the easement they were demanding. When that tactic did not work, petitioners began a multi-pronged campaign of harassment aimed at coercing him into handing over the easement and punishing him for insisting on his right to be compensated for giving the Government a property right in his land. That campaign – involving the abuse of petitioners' regulatory authority, as well as other independently unlawful conduct – violated respondents' clearly established rights under the Fifth Amendment and the Racketeer Influenced and Corrupt Organizations Act (RICO).

I. Respondent's principal submission is that the Fifth Amendment forbids government action to acquire private property coercively without just compensation, including action to penalize those who insist on their Fifth Amendment rights. Making the remarkable suggestion that penalizing those who insist on their federal constitutional rights offends the Constitution only if the rights thereby penalized find their roots in the Free Speech and Petition Clauses of the First Amendment, petitioners systematically overlook precedents applying an anti-retaliation principle to a wide array of constitutional provisions, ranging from the Fifth Amendment privilege against self-incrimination, to the Sixth Amendment right to a criminal jury trial, to the Due Process right to appeal a criminal sentence, to the right to travel. Far from being arbitrarily excluded from this protection, the Fifth Amendment right to refuse to relinquish one's property has been protected from retaliation with special vigor through the doctrine of "unconstitutional conditions" even when the retaliation has taken only the form of withholding certain "discretionary benefits," much less the form of abrogating

elementary rights to be free of false criminal and regulatory accusations, illegal trespass on one's land, and ongoing harassment of one's business and its customers.

Petitioners seek to avoid the force of the Fifth Amendment by insisting that its only office is to guarantee just compensation when government completes a legislatively authorized taking. But the guarantee of just compensation would be meaningless if it did not include a right to prevent the government from obtaining one's property by pressuring one to waive the right to such compensation. Thus, the fact that a property owner subjected to a classic taking may seek relief only through a Tucker Act suit for just compensation has never prevented this Court from enforcing the Takings Clause in other contexts through adjudications that did not require the property owner to endure the taking and seek only post-hoc compensation.

Indeed, where, as here, executive officials have no legislative authority to take property, the Tucker Act holds no possibility of just compensation at the end of the day, even if the victim of official harassment succumbs and gives over his property to the Government. Not only would the Government undoubtedly deny that there had been any taking (as the property was, on the face of things, freely given) but there would be no compensation even if the victim could prove that the exchange had been coerced, for it has long been established that the taking of property by government officials without legislative authority is not compensable under the Tucker Act or Takings Clause. The *only* remedy against officials who defy not only the Constitution but the legislative restrictions on their authority is a damages suit against those officials. That remedy is available even to those who successfully resist the coercion but suffer damage from the attempt.

II. Petitioners insist otherwise, arguing that in fact a *Bivens* remedy is never available to remedy Fifth Amendment violations of this or any other kind.

That argument is outside the scope of this interlocutory appeal. Whether petitioners' conduct violated clearly established Fifth Amendment rights, and what remedy should follow if it did, are two entirely distinct questions; only the first falls within the collateral order doctrine. Moreover, petitioners already had their claim fully adjudicated in a prior appeal, from which they sought no review in this Court. An appeal raising a previously rejected question of law is foredoomed by the law of the case doctrine and does not qualify as one of the "small class" of cases too important to be denied immediate review.

In any event, nothing in the Fifth Amendment, Tucker Act, or Administrative Procedure Act precludes respondent from using a *Bivens* action to obtain the only relief available for his constitutional injuries. While the Tucker Act may provide a statutory means for vindicating "classic takings" claims, it provides no remedy for the injuries inflicted by petitioners' attempts to evade the ordinary process for taking private property. And nothing in the APA reflects a congressional determination that the default procedures and limited recourse of that statute should – even when completely inapplicable because the defendant's conduct is unrelated to any agency action – leave the victim of serious constitutional violations without any remedy at all.

III. This Court must also deny petitioners' assertion that they are entitled to qualified immunity against respondent's RICO claim. As an initial matter, the qualified immunity defense to suit, developed for suits under § 1983 and *Bivens*, should not be extended to civil RICO claims. No such defense was available at common law in suits to recover extorted payments against public officials and there is no sufficient policy reason to create one now for civil liability that accrues only when an official is already subject to criminal sanction, and is protected from both unless willful misconduct is proven.

In any case, petitioners' conduct – seeking to obtain a property interest from respondent, through the use of their official powers – plainly constitutes attempted extortion under the Hobbs Act and the state blackmail statute. Petitioners' conduct was "authorized" only in the sense that it involved the use of authorized regulatory powers, turned to an unlawful purpose, as in nearly every case of extortion under color of official right. That petitioners sought the easement for their employer rather than for themselves is no more a defense for a government official than it is for a private employee, a member of a union, or a low-level mobster. The focus of the offense is on the injury to the victim, not the identity of the beneficiary. The Act's requirement of "wrongful" conduct and willful intent are sufficient to protect the interest against undue interference with governmental activities. The Court need not invent what is in effect an absolute immunity for governmental extortion.

ARGUMENT

I. THIS CASE INVOLVES NOT "OVERZEALOUS" REGULATORY ACTION BUT AN ATTEMPT BY GOVERNMENT OFFICIALS TO CIRCUMVENT THE LIMITS OF THEIR OWN AUTHORITY AND THE REQUIREMENTS OF THE FIFTH AMENDMENT.

At the outset, it is necessary to correct petitioners' pervasive misrepresentations about the facts of this case.

A. Petitioners Had No Authority To Use Their Regulatory Power To Coerce Respondent Into Giving The Government An Easement Without Just Compensation.

Petitioners premise much of their argument on the assertion that they have been sued for simply doing their job, which includes "taking tough regulatory actions [and] driving hard bargains . . . on behalf of the government." Pet. Br. 18.

They imply throughout that they had congressional and regulatory authority not only to acquire an easement across respondent's property, but also to achieve that end through the various oppressive acts that form the basis of this suit. That is not so. Although the Tenth Circuit assumed that "regulatory authority may exist" for "each of [petitioners'] actions," Pet. App. 17a-18a, the court did not assume, and could not have found, that the relevant statutes and regulations permitted petitioners to *use* their regulatory authority in the way they did, for the purpose of extracting an easement without paying for it.

Nothing in the "reciprocal grants" regulation authorized petitioners' conduct. That provision allows the BLM to require an "applicant for a right-of-way . . . as a condition of receiving a right-of-way, to grant the United States an equivalent right-of-way that is adequate in duration and rights." 43 C.F.R. § 2801.1-2 (2004). Set aside that the regulation plainly did not authorize petitioners to demand a rent-free easement for the BLM and its assigns in exchange for having given respondent's predecessor-in-interest a limited right-of-way requiring rental payments and precluding assignment. Set aside further that respondent himself was never an "applicant for a right-of-way," having obtained the right-of-way from Nelson, who had inarguably complied with the condition that he grant the government an easement. Even ignoring those problems, petitioners simply have no argument that this regulation required respondent to give the BLM an easement after they had cancelled his right-of-way in 1995. Having foregone the *quo*, he owed the BLM no *quid*. Petitioners' subsequent actions can in no way be seen as authorized efforts to recover an easement the BLM was owed.

Moreover, even if respondent had owed the BLM an easement, petitioners cannot seriously contend that the regulation gave them authority to recover that property interest through any means other than cancellation of the right-of-way. At the very least, nothing authorized petitioners

to pursue an easement by filing false criminal charges against respondent, trespassing on his property, breaking into his lodge, harassing his guests, issuing false administrative charges, selectively enforcing grazing regulations, and the like. Indeed, many of these acts were independently unlawful.

The court of appeals' decision, therefore, must be read as assuming nothing more than that petitioners used the authority granted by the regulations for purposes the regulations did not permit.

B. Petitioners' Attempts To Deny The Factual Basis Of The Decision Below Must Be Rejected.

Unable to argue that their conduct was actually authorized, petitioners resort to simply asserting that the allegations against them are untrue. *See* Pet. Br. 24 (claiming petitioners did not trespass); *id.* 25 (claiming they did not "cause false criminal charges to be filed against" respondent); *id.* (asserting they did not cancel right-of-way, grazing permits, or special use permit "to coerce respondent into granting the government a reciprocal easement"); *id.* at 45 ("[T]he only regulatory action BLM took that can be fairly characterized as being based on respondent's refusal to grant the United States a reciprocal easement on his land was the cancellation of the right-of-way the government had granted to respondent."). Those factual assertions were rejected by the district court, which found that the summary judgment evidence substantiated respondent's allegations. *See* Pet. App. 12a, 38a-39a. Right or wrong, that conclusion is not subject to review in this interlocutory appeal. *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

Even if petitioners could evade this jurisdictional limit by framing their factual defenses in terms of the preclusive effect of various administrative proceedings and the denial of attorney's fees in the criminal case, see Pet. Br. 24-26, it would do them no good. Having failed to raise preclusion as

a defense in their answer, they have waived that defense. *See* Answer to Second Amendment Complaint ¶¶ 182-183 (affirmative defenses); *Arizona v. California*, 530 U.S. 392, 410 (2000); *Blonder-Tongue Laboratories, Inc. v. Univ. Of Ill. Found.*, 402 U.S. 313, 350 (1971). Nor would the administrative proceedings have preclusive effect in any event: the IBLA has specifically disavowed any jurisdiction to consider claims of unconstitutional conduct, or to inquire whether administrative action was undertaken for a coercive or retaliatory purpose. *See H. Frank Robbins*, 170 I.B.L.A. 219, 227 (2006); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979).[12] At the same time, the denial of attorney's fees for the criminal case establishes, at most, that the *prosecutors* did not act in bad faith; it does nothing to preclude respondent's claim that *petitioners* engaged in a wrongful abuse of their official powers in bringing the false charges to the prosecutors in the first place.

Finally, petitioners dispute respondent's allegations of retaliatory trespass by asserting that they were, in every instance, simply exercising their right of "administrative access" included as a condition in respondent's grazing permits. Pet. Br. 24. But the permits and regulations allow such access only "for the orderly management and protection of the public lands." 43 C.F.R. § 4130.3-2(h). The district court found that the summary judgment evidence substantiated respondent's claim in his complaint that the

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[12] Thus, the IBLA's passing statement in *H. Frank Robbins*, 146 I.B.L.A. 213, 219 (1998), that respondent had not documented any instances of unconstitutional "blackmail" by petitioners could have no preclusive effect – the constitutional question was beyond the Board's jurisdiction to consider and the statement was entirely unnecessary to the Board's decision (which was limited to the question of whether respondent had violated a regulation by maintaining without permission a BLM road near his property).

incursions on his land were undertaken for an entirely different, and unlawful, purpose: to coerce and retaliate. Pet. App. 30a, 37a-38a. That finding is not subject to review on interlocutory appeal. *Johnson*, 515 U.S. at 313.

Accordingly, this case has nothing to do with "the sort of give and take that both Congress and this Court" have approved in the public lands context, Pet. Br. 46, and everything to do with the kinds of abuse of power the Fifth Amendment and the Hobbs Act were enacted to redress.

II. THE FIFTH AMENDMENT PROHIBITS OFFICIAL ATTEMPTS TO PUNISH THOSE WHO INSIST UPON THEIR FIFTH AMENDMENT RIGHTS AND TO COMPEL THE RELINQUISHMENT OF PRIVATE PROPERTY WITHOUT PAYING JUST COMPENSATION.

Properly understood, this case thus presents a simple constitutional question: can government officials avoid the Fifth Amendment's prohibition against taking property without just compensation by using their regulatory powers to harass, punish, and coerce a private citizen into giving the Government his property without payment? The answer to that question is a resounding, and clearly established, "No."

A. The Right Against Retaliation For Exercise Of Constitutional Rights, Including The Right To Just Compensation, Is Clearly Established.

Petitioners do not dispute that their conduct would violate respondent's clearly established constitutional rights if it had been directed at punishing him for exercising a First Amendment right. The sole basis of their defense is their assertion that "the Fifth Amendment does not embody [any] anti-retaliation right." Pet. Br. 37. Indeed, petitioners go even further, asserting that "[u]ntil the decision below, no court of appeals had ever recognized a constitutional right against retaliation outside the context of activity protected by

the First Amendment." *Id.* These remarkable claims are, unsurprisingly, false.

It is a canard that the only federal rights shielded from retaliation in our constitutional canon have been the rights of free speech and peaceful petition for redress of grievances. While the right against retaliation has arisen most frequently in the First Amendment context, this Court has never held that to be the only area in which the people may exercise their constitutional rights free from retaliation. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – *especially*, his interest in freedom of speech") (emphasis added). Part and parcel of what it *means* to have a constitutional right is that the Constitution forbids punishment for its exercise.

Thus, it is elementary that, "[w]hatever may be said of [the Government's] objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *United States v. Jackson*, 390 U.S. 570, 581-82 (1968); *see also Saenz v. Roe*, 526 U.S. 489, 499 n.11 (1999) (same); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ."). This Court has applied that principle to hold unconstitutional measures penalizing not only the exercise of First Amendment rights (such as the right to free speech,[13] freedom of association,[14] and free exercise of

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[13] *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75, 686 (1996); *Rankin v. McPherson*, 483 U.S. 378, 383-84, 392 (1987); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 601-02 (1967); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

[14] *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 716-20 (1996); *Branti v. Finkel*, 445 U.S. 507, 515-20 (1980); *Elrod v.*

religion[15]), but also assertions of the Fifth Amendment privilege against self-incrimination,[16] insistence on the right to trial by jury,[17] appealing a criminal sentence,[18] and exercising the right to travel.[19] Although the specific application of the principle, and the applicable legal tests, may vary from context to context, in every case this Court has enforced the basic imperative that government officials may not inflict unwarranted hardship on those who exercise constitutional rights, lest the Government be permitted to do indirectly what it is forbidden from accomplishing directly.

Fifth Amendment property rights are "as much a part of the Bill of Rights as the First Amendment" and should not be "relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). In fact, it is in the Fifth Amendment context that this Court has applied with special vigor "the well-settled doctrine of 'unconstitutional conditions,'" *id.* 385, under which the government "may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in

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Burns, 427 U.S. 347 (1976); *Wieman v. Updegraff*, 344 U.S. 183, 190-92 (1952).

[15] *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963).

[16] *Lefkowitz v. Turley*, 414 U.S. 70, 82-84 (1973); *Brooks v. Tennessee*, 406 U.S. 605, 610-12 (1972); *Griffin v. California*, 380 U.S. 609, 613-15 (1965).

[17] *Jackson*, 390 U.S. at 581-83; *United States v. Goodwin*, 457 U.S. 368, 384 (1982).

[18] *Blackledge v. Perry*, 417 U.S. 21, 27-29 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969).

[19] *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254-62, 260-70 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.*; *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836-37 (1987). In this case, petitioners demanded that respondent give up his right to just compensation in exchange not simply for a "discretionary benefit," like a grazing and special use permit, but also as a condition of enjoying his incontestable *entitlement* to conduct his business free from the scourge of false criminal and regulatory accusations, illegal trespass on his land, and continued harassment of his business and its customers.[20] Here, as in *Nollan*, petitioners were "simply trying to obtain an easement through gimmickry, which convert[s] a valid regulation of land use into 'an out-and-out plan of extortion.'" *Dolan*, 512 U.S. at 387 (quoting *Nollan*, 483 U.S. at 837).

B. The Fifth Amendment Proscribes Petitioners' Attempts To Circumvent The Just Compensation Clause.

Petitioners' conduct served not simply to punish respondent for asserting his Fifth Amendment rights, but also to coerce him into waiving them. As the court of appeals rightly held, the Fifth Amendment does not permit

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[20] They assert, instead, that *Nollan* is inapplicable because here the right conditioned was not the right to use one's own property, but the right to access federal land. Pet. Br. 47. Given the commingling of private and federal land in the west, denying the "privilege" of access to federal land often results in the effective denial of access to, or economic use of, one's own private property. At any rate, *Nollan* was simply a particular application of the broader unconstitutional conditions doctrine that applies to the denial of benefits beyond the privilege of constructing buildings on one's own property. *See* 483 U.S. at 836-39. Even if the nature of the benefit denied in *Nollan* had some bearing on the precise formulation of the constitutional test, the exchange demanded here could not satisfy any conceivable standard.

government officials "to extort a right-of-way to avoid the requirement of just compensation." Pet. App. 13a. If the Fifth Amendment is to have any meaning, "it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.*

Petitioners disagree. "Because the only guarantee of the Fifth Amendment is the availability of just compensation," they assert, "respondent has no Fifth Amendment right to preclude the government from taking his property (or under his theory, from seeking to coerce him to grant property to the government) . . . . when [it] is not exercising its eminent domain power." Pet. Br. 41-42 (internal quotation marks omitted). Consequently, they conclude, the only cognizable claim under the Fifth Amendment is one for compensation for a taking that has already been completed, which never happened here. That argument is unsound.

1. While it is certainly true that in the case of a "classic taking," a property owner may seek a remedy only through a suit for compensation under the Tucker Act, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), this Court has never held that such cases exhaust the scope of the Takings Clause or the remedial authority of the courts. To the contrary, this Court has, for example, barred injunctions that would effectuate a taking, without ever suggesting that the property owner was required to endure the taking and seek only compensation after it was completed. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 169, 178-80 (1979); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). It has further held that declaratory and injunctive relief was available to invalidate government action that would effect a taking. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (striking permit condition that would have effected a taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (same); *Hodel v. Irving*, 481 U.S. 704, 713-18 (1987) (striking down federal statute under Takings Clause); *see*

also E. Enters. v. Apfel, 524 U.S. 498, 519-22, 538 (1998) (plurality opinion) (concluding that federal statute should be struck down under Takings Clause).

Respondent brings no "classic taking" claim. He alleges instead that petitioners engaged in a course of conduct calculated to pressure him into giving up the easement they desired without the BLM ever *having* to "take" that easement and pay just compensation – to induce respondent, in other words, to *waive* his Fifth Amendment right to just compensation. That claim is plainly cognizable under the Fifth Amendment, which provides a single means by which the government may coercively acquire a property interest in private land – through an actual taking with just compensation. As such, the Fifth Amendment necessarily forbids the use of procedures and stratagems designed to extract property while avoiding compensation. No constitutional protection worth its salt can permit its own circumvention through the simple expedient of forced waiver.

2. The Fifth Amendment also prohibits, in plain terms, the taking of private property when no compensation is available. *See* U.S. Const. amend. V ("*[N]or shall private property be taken* for public use, without just compensation.") (emphasis added). That prohibition protects both the people and the public fisc from attempts by executive officials to take private property without legislative authorization.

Petitioners' conduct bears a striking resemblance to the abuses that were in large part responsible for the enactment of the Fifth Amendment. While undoubtedly concerned about the power of legislatures and executive agencies to exercise eminent domain without affording just compensation, the founding generation also recalled with bitterness the widespread practice of military impressments of private property during the revolutionary war. *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791-92 (1995). That practice offended the long established

principle that government officials could not take private property without legislative authority, a right laid down in the Magna Carta.[21] *See, e.g., id.* at 787-89. John Jay thus wrote that it was "the undoubted Right and unalienable Priviledge of a Freeman not to be divested . . . [of] Property, but by Laws to which he has assented . . . Violations of this inestimable Right by the King of Great Britain, or by an American Quarter Master; are of the same Nature . . ."[22]

Both as enacted and as originally drafted, the Fifth Amendment strictly prohibited unauthorized takings by executive officials by permitting the taking of private property for public use only when the legislature made just compensation available, thereby ensuring that the taking itself would be legislatively authorized. Madison's original draft of the Fifth Amendment thus provided that "No person *shall be . . . obliged to relinquish his property*, where it may be necessary for public use, without a just compensation." 1 ANNALS OF CONG. 451-52 (Joseph Gales ed., 1834) (emphasis added); *see also* Randall T. Shephard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847, 853-56 (1989). The plain implication – carried forward in the final text of the amendment – was that where just compensation is unavailable, a taking is constitutionally prohibited.

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[21] Article 39 of the Magna Carta provides that "No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." Magna Carta art. 39, *reprinted in* William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (1958).

[22] John Jay, A Hint to the Legislature of the State of New York (1778), *in* 1 JOHN JAY: THE MAKING OF A REVOLUTIONARY, UNPUBLISHED PAPERS 1745-1780, at 461, 462 (Richard B. Morris ed., 1975).

Of course, if the Constitution required Congress to pay for every taking effected by any executive official – no matter how low ranking the officer or how unauthorized the acquisition – it would be true that the only effective limitation imposed by the Takings Clause would be to ensure that Congress paid the public debt accumulated as a result of executive action. But the constitutional structure is the reverse: Congress controls the purse and is entitled to determine when it shall be opened to pay for the taking of private property. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952); *id.* at 631-32 & n.2 (Douglas, J., concurring). Accordingly, this Court has long held that the unauthorized taking of property by executive officials does not subject the United States to liability for just compensation. *See, e.g., Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 127 (1974); *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920) (per Brandeis, J.); *Hooe v. United States*, 218 U.S. 322, 335-36 (1910).

The result is that when Congress denies a Quartermaster the authority to impress private property, there is no right to compensation — but the lack of compensation renders the impressments unconstitutional. And in the absence of a congressionally authorized taking, individuals have a Fifth Amendment right to prevent government officials from exercising dominion over their land, not because the "right to exclude" is inherent in the Fifth Amendment (*contra* Pet. Br. 41), but because the Fifth Amendment protects that state law property interest from invasion in the absence of a taking for which compensation is available. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Congress has required that takings be effectuated through condemnation proceedings initiated by the Attorney General that afford property owners significant substantive and procedural protections, as well as an important measure of political oversight and accountability. *See* 40 U.S.C. §§

3111-3118; Fed. R. Civ. P. 71A. And 43 U.S.C. §1715(a) forbids exercise of this eminent domain power by the BLM unless shown "necessary to secure access to public lands"; *see United States v. 82.46 Acres of Land*, 691 F.2d 474, 477 (10th Cir. 1982). But petitioners have never contended that they were trying to obtain respondent's property pursuant to this delegation of power by Congress.[23] On the contrary, their conduct was an evasion of these statutory limitations as much as it was an end-run around the Fifth Amendment.[24]

Because Congress did not authorize what petitioners did as a means of obtaining respondent's property, respondent would have had no right to compensation under the Tucker Act even if he *had* succumbed to their coercion. In addition, he would have faced the daunting task of proving that what appeared to be a voluntary conveyance was, in fact, a coerced taking of his property.[25] Petitioners can hardly claim, therefore, that instead of suing them, respondent should have caved in, given them the easement, and then sued the United States under the Tucker Act. Where, as here, a suit against the Government is not available, a suit against the

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[23] Even if they had *wanted* to call the Department's (and the public's) attention to their embarrassing negligence in permitting the easement they had obtained from George Nelson to lapse, nothing in the record suggests they could have met the statutory conditions for a condemnation by the BLM.

[24] Petitioners rightly note that a taking may occur through excessive regulation as well, but that does nothing to show that petitioners were entitled to acquire an *easement* on respondent's property outside the eminent domain process.

[25] This Court has specifically held that the impermissible "tend[ency]" of a challenged government action "to discourage" individuals from "insisting upon" their rights "hardly implies that every[one] who [waives those rights] does so involuntarily." *United States v. Jackson*, 390 U.S. at 583. *See Brady v. United States*, 397 U.S. 742, 746, 758 (1970) (holding a *Jackson*-induced waiver "voluntarily and intelligently made").

lawbreaking officials is the quintessentially appropriate remedy. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971); *id.* at 410 (Harlan, J., concurring) (damages remedy against individual officer especially appropriate where "it is damages or nothing").

3. Finally, that petitioners failed to actually obtain respondents' property can be no defense. As illustrated in cases like *Pennsylvania Coal* and *Kaiser Aetna*, one need not acquiesce to government attempts to take property in violation of the Takings Clause before being entitled to challenge them. That Fifth Amendment shield does not evaporate just because the government has failed in its scheme to harass the owner into turning over the property without compensation.[26] Whenever such circumvention succeeds in injuring the owner but not in inducing him to transfer the desired property interest to the government, there has been an obvious violation of the prohibition embodied in the Takings Clause. Surely, the drafters of the Fifth Amendment intended no less protection and remedy to those who resist the Quartermaster's unauthorized coercion than to those who hand over their property at the point of a bayonet.

Accepting petitioners' position would place respondent and others like him in the untenable position of having to choose between enduring indefinitely a campaign of harassment designed to deprive them of both their property

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[26] On the contrary, this Court's practice has been to permit those who resist government pressure to challenge the coercive and punitive character of the actions imposing that pressure in part because the power to treat those who succumbed as having done so involuntarily "might alleviate, but it cannot totally eliminate, the constitutional infirmity" of such actions. *See*, e.g., *United States v. Jackson*, 390 U.S. at 582-83; *accord*, *Parker v. North Carolina*, 397 U.S. 790, 794-95 (1970); *McCann v. Richardson*, 397 U.S. 759, 771 (1970).

and their right to compensation, or giving in to the extortion with the hope that they will later be able to persuade a court that what seemed on its face to be a voluntary gift or bargain was instead an unlawful taking. The Fifth Amendment is plainly less cavalier about property rights than that.

C. Petitioners Are Not Entitled To Qualified Immunity.

Petitioners do not dispute that qualified immunity would be unavailable if their actions had been designed to punish respondent for "petitioning the government for just compensation," Pet. Br. 40, a First Amendment right, rather than for refusing their demand to give them his property without just compensation, a Fifth Amendment right. But no reasonable official could have believed that the Constitution prohibited the first, but permitted the second. As shown above, petitioners' apparent belief that only First Amendment rights are protected against retaliation contradicts this Court's clear precedent and is patently unreasonable. That there are no reported cases concerning retaliation against the exercise of Just Compensation Clause rights did not deprive petitioners of "fair notice" that they were forbidden to engage in a campaign to beat down respondent's resistance to their unlawful demands until he waived his constitutional right to just compensation. *See Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). This Court's decisions do not require that a defendant's conduct be identical to that in a reported case to defeat claims of qualified immunity. As this Court emphasized in *Pelzer*, "[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741.

III. RESPONDENT'S *BIVENS* CLAIM IS NOT PRECLUDED.

Petitioners argue that even if their conduct violated the Fifth Amendment, no *Bivens* remedy is available in light of alternative remedies under the Fifth Amendment, the Tucker

Act and the APA. Pet. Br. 37. That argument is not properly before this Court and is in any event meritless.

A. Petitioners' *Bivens* Preclusion Argument Is Not Properly Before This Court.

This Court may not consider the merits of petitioners' *Bivens* preclusion argument because the Tenth Circuit lacked jurisdiction to consider that issue given the procedural posture of this case as an interlocutory appeal on a question of qualified immunity. *See, e.g., Will v. Hallock*, 126 S. Ct. 952, 957 (2006) (having granted certiorari to consider merits of court of appeals' decision, vacating judgment and remanding for dismissal of appeal for lack of appellate jurisdiction).

1. Petitioners' Bivens *Preclusion Argument Does Not Fall Within The Collateral Order Doctrine.*

Petitioners rightly do not claim that the question whether a *Bivens* remedy is available falls within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, petitioners attempt to ride on the jurisdictional coattails of the district court's qualified immunity decision – over which the court of appeals had appellate jurisdiction under *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) – by asserting that the issues are "inextricably intertwined." Pet. Reply Br. 6. They are not.

This Court has rejected the doctrine of "pendent appellate jurisdiction," lest parties "parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers County Commission*, 514 U.S. 35, 49-50 (1995). Congress has, instead, provided other mechanisms for seeking interlocutory review of issues falling outside the collateral order doctrine.[27]

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[27] *See* 28 U.S.C. § 1292(b) (certification of orders for interlocutory review); 28 U.S.C. §§ 2072(c), 1292(e) (allowing Supreme Court to expand class of final appealable orders by rule).

Swint's suggestion that review might be permitted for issues "inextricably intertwined with" the denial of qualified immunity or "necessary to ensure meaningful review" of the immunity question, *id.* at 51, is irrelevant to this case. This Court has already described the "*Bivens* inquiry" as "analytically distinct from the question of official immunity." *United States v. Stanley*, 483 U.S. 669, 684 (1987). As petitioners acknowledge, the availability of a *Bivens* remedy turns on whether "Congress has provided what it considers adequate remedial mechanisms for constitutional violations," Pet. Br. 31 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)), while the qualified immunity analysis depends on "whether it would be clear to a reasonable officer that his conduct was unlawful," Pet. Br. 48 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Because there is no overlap between these issues, review of petitioners' *Bivens* preclusion argument is not even necessary, much less "essential" to resolving the question of qualified immunity. *Swint*, 514 U.S. at 51 (citation omitted).

Nor is *Hartman v. Moore*, 126 S. Ct. 1695 (2006), to the contrary. *Contra* Pet. Reply 5-6. There, this Court found "the definition of an element of the tort" plainly within the scope of a qualified immunity appeal, *id.* at 1702 n.5, because the first step in an immunity analysis is to determine whether "the facts alleged show the officer's conduct violated a constitutional right," *Saucier*, 533 U.S. at 201, a step that requires determining what the elements of the constitutional violation are. One can, on the other hand, easily decide whether a defendant violated a clearly established constitutional right without deciding whether *Bivens* is available to remedy that violation. For example, in *Davis v. Passman*, 442 U.S. 228, 234-35 (1979), there was no question that firing an employee because of her sex violated her clearly established constitutional rights. Whether she was entitled to a *Bivens* remedy against a Congressman was an entirely different and unrelated question. *Id.* at 236-49.

2. *The Collateral Order Doctrine Does Not Permit An Interlocutory Appeal To Raise A Purely Legal Question Rejected In A Prior Appeal, As Petitioners Seek To Do In This Case.*

Interlocutory jurisdiction is also unavailable because the Tenth Circuit previously considered and rejected the precise *Bivens* preclusion argument petitioners now seek to raise again in an interlocutory appeal. Pet. Br. 9. Petitioners could have sought this Court's review of the first decision, but chose not to. Instead, they returned to the district court, then tried to take an interlocutory appeal to the Tenth Circuit to raise the same arguments a second time in that court. Nothing of relevance changed between the two appeals – the purely legal argument does not depend on the facts of the case which, in any event, have remained unchanged since the first appeal. *See* Pet. App. 36a-37a.

An appeal urging a court to reconsider a prior decision, when nothing in the law or the facts of the case has changed, does not fall within the "small class" of rulings that are "too important to be denied review" on an interlocutory appeal, *Cohen*, 337 U.S. at 546. With few exceptions, the result of such an appeal is foreordained by the law of the case doctrine. *See Agostini v. Felton*, 521 U.S. 203, 236 (1997); *see also Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999).[28] Petitioners have identified no legitimate, much less important, interest served by permitting such hopeless appeals.

Of course, as this Court held in *Behrens v. Pelletier*, 516 U.S. 299 (1996), when the factual predicate of a qualified immunity defense has changed, permitting an additional appeal to consider the defense in the changed context serves an important purpose, *id.* at 309. But this Court's decision in

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[28] The prior decision is also "law of the circuit," not subject to revision by a subsequent panel absent rehearing en banc or an intervening decision of this Court. *See, e.g., In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

Behrens did nothing to undercut the principle, which courts of appeals have routinely continued to apply, that interlocutory appeals are not available to raise the same arguments rejected in a prior appeal when nothing of relevance has changed.[29]

B. Neither The Fifth Amendment, Nor The Tucker Act, Nor The APA Precludes Respondent's *Bivens* Claim.

Petitioners' *Bivens* preclusion argument is meritless in any event. "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). Nothing in the Tucker Act, the Fifth Amendment, or the APA precludes the quintessential use of *Bivens* to remedy the unconstitutional conduct of federal officials.

1. The Fifth Amendment And The Tucker Act Do Not Preclude Respondent's Bivens *Claim.*

Petitioners first contend that "no *Bivens* action would be appropriate for an *actual* taking of property under the Fifth Amendment," Pet. Br. 30, because a property owner may obtain just compensation from the Government under the Fifth Amendment or the Tucker Act. *Id.* at 28-30. While true, that is beside the point. The essence of respondent's claim is not that he was subjected to a taking, for which other remedies clearly are available, but that he was subjected to a shadow process, invented by petitioners to coerce him to

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[29] *See, e.g.*, *Cozza v. Network Associates, Inc.*, 362 F.3d 12, 16 (1st Cir. 2004); *Vega v. Miller*, 273 F.3d 460, 466 (2d Cir. 2001); *Grant v. City of Pittsburgh*, 98 F.3d 116, 120 (3d Cir. 1996); *Chambers v. Ohio Department of Human Services*, 145 F.3d 793, 796 n.5 (6th Cir. 1998); *Fairley v. Fermaint*, 471 F.3d 826, 827 (7th Cir. 2006); *Riley v. Camp*, 130 F.3d 958, 967-68 (11th Cir. 1997); *Kimberlin v. Quinlan*, 199 F.3d 496, 501 (D.C. Cir. 1999).

relinquish his property without his being able to seek compensation. Petitioners do not, and indeed cannot, claim that the Just Compensation Clause or the Tucker Act provides any remedy for such violations.

2. The APA Does Not Preclude A Bivens *Action For Official Conduct Unreviewable Under That Act Because Unrelated To Final Agency Action.*

Petitioners acknowledge that absent an express declaration by Congress, the existence of a statute like the APA precludes an otherwise available *Bivens* remedy only when "the design of [the] Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." Pet. Br. 31 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).[30]

Even if the APA were to preclude *Bivens* actions for some constitutional violations by agency officials, it surely does not preclude relief for unconstitutional conduct that is not even *subject* to the APA because it is "unrelated to any final agency action." Pet. App. 81a-82a. Essentially, petitioners ask this Court to hold that Congress made a conscious decision that there should be no remedy whatsoever for private citizens subjected to unconstitutional conduct by agency officials deploying their official powers so far outside their agency's proper responsibilities that their acts are not even related to agency action. The assertion that Congress has intended to preclude all relief for unconstitutional conduct

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[30] Petitioners do not suggest that Congress expressed a preclusive intent "by statutory language [or] clear legislative history." *Bush v. Lucas*, 462 U.S. 367, 378 (1983). Nor do they argue that there are other "special factors" counseling hesitation in applying *Bivens*, such as the "special nature of military life," *United States v. Stanley*, 483 U.S. 669, 681, 679 n.17 (1987), or the uniquely sensitive relationship between the federal government and its employees, *Bush v. Lucas*, 462 U.S. 367, 388-89 (1983).

is so "extraordinary," that it requires "'clear and convincing' evidence" of congressional intent, *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (citation omitted), something petitioners have not provided.

This Court has repeatedly applied *Bivens* to afford a remedy when "the plaintiff lacked any other remedy for the alleged deprivation," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001) (citing *Davis*, 442 U.S. at 245), and even when a remedy was available but plainly inadequate, *id.* at 67-68 (citing *Carlson*, 446 U.S. at 18-23). And when this Court has declined to permit a *Bivens* remedy in light of a federal statute, it has stressed that doing so would leave "an avenue for some redress," even if not a fully compensatory damages remedy. *Malesko*, 534 U.S. at 69 (citing *Chilicky*, 487 U.S. at 425-27); *see also Bush*, 462 U.S. at 388. While petitioners may think that the constitutional violations alleged in this case are "too insignificant to merit" judicial review, Pet. Br. 33, they have provided no reason to think Congress shared that disregard for its citizens' constitutional rights.

In fact, there is nothing in the design, language, or history of the APA to suggest that Congress intended that statute to supplant *Bivens* actions against individual federal officials who violate citizens' constitutional rights, even when it applies and provides a partial administrative remedy. This Court has routinely entertained *Bivens* actions against officials of federal agencies that are subject either to the APA or to similar administrative review systems. *See, e.g.*, *Hartman v. Moore*, 126 S. Ct. 1695 (2006); *Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Cleavinger v. Saxner*, 474 U.S. 193 (1985). The APA is an avenue of last (not first and only) resort, authorizing judicial review under the Act only when "there is no other adequate remedy in a court." 5 U.S.C. § 704. Congress also provided that the APA's judicial review provisions "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law," 5 U.S.C.

§ 559, further illustrating its intent that the APA supplement, not supplant, other law governing agencies and their officials. For example, the APA does not preclude a claim for damages under the Federal Tort Claims Act, even when the official's conduct giving rise to liability would have been subject to review under the APA. *See Beins v. United States*, 695 F.2d 591, 597-98 (D.C. Cir. 1982). There is no reason to think that Congress somehow intended the APA to preclude an action based on the same facts under *Bivens*.[31]

Nor is this a case in which the comprehensiveness of a specialized regulatory regime demonstrates a "congressional unwillingness to provide consequential damages," *Chilicky*, 487 U.S. at 426. The APA bears no resemblance to the statutes reviewed in *Chilicky* and *Bush v. Lucas*, 462 U.S. 367 (1983), both cases in which Congress had – after prolonged study and "repeated consideration of the conflicting interests involved" in a specific area of government activity, *Bush*, 462 U.S. at 385 – enacted administrative regimes tailored to the special contexts of federal employment (*Bush*) and social security (*Chilicky*) claims. Each of those regimes created systems of administrative and judicial review far more elaborate and detailed than the default procedures of the APA. *See Bush*, 462 U.S. at 386-88; *Chilicky*, 487 U.S. at 424. And in both cases, Congress provided "meaningful remedies" for constitutional violations. *Bush*, 462 U.S. at 386; *see also Chilicky*, 487 U.S. at 425.

The APA shares none of those special features, providing instead a default set of basic procedures and limited remedies applicable to agency action across the board. Nor can petitioners seriously contend that the APA provides what Congress considered "adequate remedial mechanisms for constitutional violations," *Chilicky*, 487 U.S. at 423, arising

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[31] The FTCA, however, requires a plaintiff to choose between an FTCA action against the Government or a *Bivens* action against the official. *See* 28 U.S.C. § 2676.

under every federal regulatory regime. The Act permits a court only to order, or set aside, agency action, *see* 5 U.S.C. § 706 – equitable relief that is "is useless to a person who has already been injured," *Butz v. Economou*, 438 U.S. 478, 504 (1978), and who cannot demonstrate that the illegal conduct is ongoing or likely to be repeated, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Petitioners cannot claim, for example, that the APA would have afforded respondent any remedy for the unconstitutional inducement of the criminal prosecution against him or for any of the various completed acts of harassment and intimidation that form much of the basis of his constitutional claim.[32] For such actions, "as [in] *Bivens*, 'it is damages or nothing." *Davis*, 442 U.S. at 245 (italics added, citation omitted).

Moreover, the APA cannot preclude a *Bivens* action where, as here, the administrative process cannot even entertain a citizen's constitutional claims. The IBLA refused to consider respondent's claim that various administrative acts were unconstitutional because they were undertaken to coerce him to waive, and punish him for asserting, his Fifth Amendment rights. The Board explained that it was not a "court[] of general jurisdiction empowered to hear and rule on such allegations or to provide relief for proven violations," *H. Frank Robbins*, 170 I.B.L.A. 219, 227 (2006). Accordingly, the Board "has no authority to invalidate an otherwise valid BLM grazing trespass decision based on proof of improper motive on the part of a BLM official or employee involved in

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[32] In fact, given the unending variety of means employed by petitioners, it is difficult to imagine that respondent could have secured, or a court could have crafted, an effective injunction against the conspiracy. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 495-97 (1983); *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 76 (1967); *see also* Fed. R. Civ. P. 65(d).

the development or issuance of the decision." *Id.* As a result, the Board has refused to allow respondent to develop evidence in the administrative record to support his claim of unconstitutional purpose. *See id.* at 228-30; *see also* 5 U.S.C. § 706 (providing for judicial review based upon administrative record).

The APA also provides no basis to review constitutional violations that arise not from a particular discrete agency action, but rather from the cumulative effect of a pattern of harassment of the sort employed in this case. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). The unconstitutional coercion and retaliation against respondent arose from the accretion of many acts of harassment, no single one of which would necessarily have established a constitutional violation standing in isolation. *Cf. Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (hostile work environment claim "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own"). The APA is thus a particularly ill suited remedy for a conspiracy that threatens its victim's business with death by a thousand cuts.

If the mere availability of a possible administrative remedy and judicial review of agency action were sufficient to preclude a *Bivens* action, there would have been no reason for this Court in *Bush* and *Chilicky* to discuss the elaborate and comprehensive nature of the remedial schemes enacted for federal employment and social security claims or Congress's frequent and intense attention to the need to balance individual and governmental interests in those particular contexts. The generic, limited nature of a federal statute is, instead, strong reason to think that Congress did not intend it to supplant other statutory or judicial remedies like *Bivens*. Thus, in *Carlson v. Green*, 446 U.S. 14 (1980), this Court held that the Federal Tort Claims Act – which, like the

APA, provides a generalized remedy for official conduct across all areas of federal activity – does not preclude a *Bivens* action against a federal official. The Court explained that "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States." *Id.* at 21. The same is true here – the APA remedy runs against the federal agency, not the federal official. Moreover, while the FTCA at least provides a *Bivens*-like remedy of compensatory damages, the APA does little to fulfill *Bivens'* important role of ensuring compensation for the victims of unconstitutional conduct. *See Bivens*, 403 U.S. at 397. Accordingly, there is no reason to believe that Congress would have intended the APA to preclude a *Bivens* remedy for the unconstitutional conduct of agency officials, while intending the much more analogous damages remedy under the FTCA to co-exist with the *Bivens* cause of action.[33]

IV. PETITIONERS DO NOT ENJOY QUALIFIED IMMUNITY AGAINST RESPONDENT'S RICO CLAIM.

Petitioners' conduct – abusing official power to extract property from another – is classic extortion under color of official right. Petitioners insist, however, that the Court must recognize an exception to the language of the Act and the historical conception of extortion, lest public officials face the specter of RICO liability for doing nothing more than aggressively bargaining on behalf of the Government. While

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[33] Congress's ratification of *Carlson* in the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), provides further reason to doubt petitioners' preclusion claim. *See* 28 U.S.C. § 2679(b)(2); H.R. Rep. 100-700, 1988 U.S.C.C.A.N. 5945 at 5949-50. It would be passing strange for Congress to have taken steps to confirm the availability of *Bivens* actions against federal employees if it believed that the APA already precluded nearly all *Bivens* suits against officials of administrative agencies.

important, that concern is adequately met by enforcing the protections already built into the Hobbs Act. That statute prohibits only "wrongful" conduct and punishes only willful violations. Those limitations preclude liability for officials whose bargaining tactics are actually authorized by law or who act on the basis of a good faith mistake. Neither situation arises in this case, however, as the lower courts found that respondents' evidence establishes a triable issue regarding petitioners' good faith and intentions. There is no basis to sidestep that traditional inquiry and hold that petitioners are entirely immune simply because they engaged in extortion on behalf of their employer through the abuse of their otherwise authorized regulatory powers.

A. There Is No Qualified Immunity Defense Against Charges Of Extortion Under RICO.

While the court of appeals and the parties have to this point assumed that qualified immunity is available in a civil RICO action predicated on violations of the Hobbs Act and the Wyoming blackmail statute, that assumption is ill-founded and should be rejected by this Court.[34]

This Court developed the qualified immunity defense through an interpretation of 42 U.S.C. § 1983, a Reconstruction Era statute that does not purport to define claims and defenses, but rather provides a cause of action for violations of a broad range of often ill-defined constitutional

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[34] The existence of a qualified immunity defense being a precondition for interlocutory appellate jurisdiction, respondent's failure to raise this argument in the lower courts did not waive the objection. *See Will v. Hallock*, 545 U.S. 1103 (2005) (raising question of appellate jurisdiction over interlocutory appeal sua sponte). Moreover, a "respondent can support his judgment on any ground that appears in the record," *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 134 n.3 (1947), even if the issue is raised for the first time in this Court, *see Schweiker v. Hogan*, 457 U.S. 569, 584-85 & n.24 (1982).

prohibitions. *See, e.g.*, *Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980). Given Section 1983's (and, later, *Bivens*') unique role in constitutional adjudication, this Court has concluded that Congress intended Section 1983 to operate against a backdrop of "firmly rooted" common law defenses. *Id.* at 637 (citation omitted). Under that assumption, this Court initially recognized a substantive "good faith" defense for public officials in Section 1983 suits. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967); *see also Butz*, 438 U.S. at 503-04 (extending defense to *Bivens* claims). Subsequently, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), converting the good faith defense into an immunity asking whether a reasonable person would have known that the defendant's conduct violated a clearly established right. *See Wyatt v. Cole*, 504 U.S. 158, 165 (1992) (discussing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). But since that time, this Court has not extended the ahistorical policy-based immunity to new contexts even under Section 1983 itself. *See Richardson v. McKnight*, 521 U.S. 399, 412 (1997); *Wyatt*, 504 U.S. at 166-69; *see also id.* at 171 (Kennedy, J., concurring) (noting that qualified immunity doctrine was a "depart[ure] from history in the name of public policy" and stating that "I would not extend that approach to other contexts").

This Court should not extend Section 1983's judicially crafted defenses to RICO, a modern statute that directly and comprehensively addresses who should be liable under the statute and under what conditions, providing for civil liability upon "a violation of" the statute – not upon a violation of a clearly established RICO right. *See* 18 U.S.C. §§ 1962, 1964(c). Nor is there is any indication that a defendant's status as a public official afforded him an immunity from criminal or civil liability for extortion at common law. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35

UCLA L. Rev. 815, 839, 846, 848, 850-52 (1988) (documenting that damages awards were common in early English practice without any indication of immunity); *Hale v. McDermott*, 137 N.Y.S. 975, 976 (App. Term 1912) (same); *see also Willett v. Devoy*, 155 N.Y.S. 920, 920 (App. Div. 1915); *People v. Eichler*, 26 N.Y.S. 998, 998-1000 (Gen. Term 1894). And, of course, the objective *immunity from suit* demanded here was developed only recently by this Court in derogation of the common law.

Moreover, even if it were proper for this Court to "transform what existed at common law based on [its] notions of policy or efficiency," *Wyatt*, 504 U.S. at 171-72 (Kennedy, J., concurring), there is no reason to do so here. Civil liability for criminal conduct does not risk "unwarranted timidity on the part of public officials" or discouragement of "the vigorous exercise of official authority," *Richardson*, 521 U.S. at 408 (citation omitted), beyond that which the prospect of criminal punishment already (and intentionally) provides.

In addition, by requiring "wrongful" conduct, the Hobbs Act necessarily precludes conviction when the defendant (unlike petitioners in this case) has done nothing more than engage in authorized forms of hard bargaining or vigorous regulatory enforcement. That protection is reinforced by the requirement, common to criminal statutes, of proof that the defendant's violation of the Act was willful.[35] While neither element provides an immunity from suit, each serves the same principal function as qualified immunity, restricting liability to those cases in which the defendant was on notice that his conduct was unlawful. *Cf. United States v. Lanier*, 520 U.S. 259, 270 (1997).

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[35] *See, e.g., United States v. Cruzado-Laureano*, 404 F.3d 470, 480 (1st Cir. 2005); *United States v. Harmon*, 194 F.3d 890, 892 (8th Cir. 1999; *United States v. Stephens*, 964 F.2d 424, 429 (5th Cir. 1992).

There is no need to supplement the protections Congress has already provided. It makes little sense to require a plaintiff to prove *both* that a reasonable official in the defendant's position would know that his conduct was unlawful (to overcome qualified immunity) and then, in later proceedings to establish liability, that the defendant engaged in *willful* extortion. Cf. *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 & n. 10 (1985) (interlocutory appeal permitted for qualified immunity because it is "completely separate from the merits").

B. Petitioners' Conduct Plainly Falls Within The Clearly Established Definition of "Extortion."

The Hobbs Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioners do not dispute that an easement is "property" within the meaning of the Hobbs Act, that they attempted to obtain that property from respondent (on behalf of their employer), or that they undertook this activity under color of official right. Their conduct thus falls easily within the text of the statute, which ordinarily would be the end of the matter. *E.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).

Petitioners nonetheless insist that the Act does not apply here because the court of appeals assumed that their conduct was "authorized" and because they undertook the extortion for the benefit of the Government. Neither fact, even if true, creates a defense under the statutory language or historical understanding of extortion.

1. Petitioners' Abuse Of Their Regulatory Powers To Obtain Respondent's Property Constitutes Classic Extortion.

Petitioners' assertion that their conduct was "authorized" and therefore could not be extortionate, confuses two issues:

(1) whether the tools of extortion they used were among their authorized regulatory powers; and (2) whether Congress authorized those tools to be used to extort property in evasion of the Fifth Amendment. Respondent accepts that the Hobbs Act would not be violated here if Congress had authorized petitioners to engage in a pattern of harassment, selective enforcement of regulations, filing false criminal charges, and trespassing on respondent's property for the purpose of coercing respondent to give the Government an easement to which it was not legally entitled and for which it was unwilling to pay just compensation. That result would be compelled not by anything in the definition of "extortion," but by the simple principle that federal statutes must be read to avoid unnecessary conflict: the Hobbs Act should not be construed to criminalize conduct another statute specifically authorizes or requires. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974).

But, as discussed above, the Tenth Circuit could not have concluded that Congress authorized petitioners to use their vast administrative powers to circumvent the Just Compensation Clause in the manner established by the summary judgment evidence in this case. The use of regulatory authority for the unauthorized purpose of wresting property from a citizen is classic extortion, not "overzealous regulation." For example, in *Evans v. United States*, 504 U.S. 255 (1992), a county commissioner committed extortion by implicitly promising to vote for a rezoning application in exchange for cash. Voting in favor of the proposal was indisputably within the commissioner's lawful authority, in the same way that some of petitioners' extortionate conduct may have involved acts within their lawful authority in this case. But, like petitioners here, the commissioner in *Evans* exercised his lawful authority for an unlawful purpose and thereby ran afoul of the Hobbs Act. *See also, e.g., United States v. Gillock*, 445 U.S. 360 (1980) (state senator blocked a defendant's extradition and agreed to introduce legislation);

United States v. Swift, 732 F.2d 878, 879 (11th Cir. 1984) (city official who "had authority" to approve payment requests facilitated approvals); *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971) (defendants threatened to deny approval of intrastate stock issues).[36]

2. There Is No Absolute Immunity For Extortion On Behalf Of The Government.

Petitioners next assert that they did not attempt to "wrongfully . . . obtain" respondent's property within the meaning of the Hobbs Act because they did not seek to extort the property for their own personal gain, but instead for the benefit of their employer, the federal government. Pet. Br. 18-21. That argument – which seeks not simply qualified, but absolute immunity for acts of governmental extortion – is meritless.

That petitioners did not seek property for themselves does not mean that they did not seek to "obtain[] . . . property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2). To the contrary, "extortion as defined in the [the Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1956). Rather than focusing on the benefit to the defendant, the "gravamen of the offense is loss to the victim." *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977). Accordingly, "whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant." *United States v. Clemente*, 640 F.2d 1069, 1079 (2d Cir. 1981). Thus, as petitioners acknowledge (Pet. Br 20), this Court and others have repeatedly affirmed Hobbs

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[36] If this Court holds that "authorized" conduct cannot violate the Hobbs Act, it must remand for the Tenth Circuit to consider whether its presumption of authorization reflects the facts and, if not, whether petitioners are nonetheless immune from suit.

Act convictions when the extortionist sought property for the benefit of fellow union members,[37] a charity,[38] political parties and allies,[39] friends,[40] or other third parties.[41]

Nor can petitioners identify anything in the language, history, or purposes of the Act that carves out an exception when the defendant obtaining property for his employer works for a government rather than a crime syndicate, union, corporation, or charity. If a public official may not extort an easement for the benefit of his union (say, to provide access to a union hall), there is no reason to think that the Act permits the same officer to engage in the same extortion – inflicting precisely the same injury on the victim – if the official demanded the easement for the City (say, for access to a police station or because the union hall was located on city property).[42]

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[37] *Green*, 350 U.S. at 420; *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959); *United States v. Kemble*, 198 F.2d 889, 890-91 (3d Cir. 1952).

[38] *United States v. Hairston*, 46 F.3d 361, 365-66 (4th Cir. 1995).

[39] *United States v. Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979); *United States v. Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982); *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975), *abrogated on other grounds by McCormick v. United States*, 500 U.S. 257, 266 n. 5 (1991).

[40] *United States v. Scacchetti*, 668 F.2d 643, 647 (2d Cir. 1982).

[41] *United States v. Provenzano*, 334 F.2d 678, 685-86 (3d Cir. 1964) (defendant coerced victim to put a third party attorney on retainer).

[42] There is nothing unusual about a law that criminalizes official misconduct even when it is purportedly undertaken for the benefit of the Government. Congress has, for example, criminalized a public official's violation of constitutional rights even when the defendant was not attempting to benefit himself. *See, e.g.*, 18 U.S.C. § 242.

That conclusion is consistent with the understanding of extortion codified in the Field Code, one of the two sources of New York law used as models for the Hobbs Act, *see Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003), which illustrated its meaning by reference to *People v. Whaley*, 6 Cow. 661 (N.Y. Sup. Ct. 1827). *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. REV. 815, 893 (1988). The principal issue on appeal in *Whaley* was the claim of the defendant – a judge accused of extorting money by falsely telling a defendant he owed a judgment to a plaintiff – that the indictment was defective because "the defendant is not charged with taking the money, *as fees*, or *to his own use*." *Whaley*, 6 Cow. at 661 (emphasis in original). The court easily rejected that argument: "It was not necessary to lay the offence in that manner; it is sufficient that he extorted it by color of his office." *Id*; *see also, e.g., Willett v. Devoy*, 170 A.D. 203, 204 (N.Y. App. Div. 1915) (no defense that clerk paid extorted fees over to municipality because "[n]o distinction is made on the ground that the official keeps the fee himself").

In fact, during the time in which the common law crime of extortion was first developed, a distinction between extortion benefiting an official and extortion benefiting the government would have been difficult to draw. Many public officials were paid not by salary, but through an entitlement to keep a portion of the fees they collected. 10 William Holdwsorth, A HISTORY OF ENGLISH LAW 153, 499 (1938); Jeremy Gayed, *"Corruptly": Why Corrupt State of Mind is an Essential Element for Hobbs Act Extortion Under Color of Official Right*, 78 NOTRE DAME L. REV. 1731, 1737 (2003). In those circumstances, the collection of any fee – lawful or extortionate – was always an act that benefited both the official and the state.

As discussed above, RICO and the Hobbs Act accommodate the special nature of government employment

in more tailored ways than simply immunizing officials from liability altogether. When Congress has truly authorized "hard bargaining" techniques for the purpose of obtaining property on the Government's behalf, the authorized conduct is not "wrongful" and cannot be construed to violate the Hobbs Act. And the requirement of willfulness provides additional protection against liability for good-faith mistakes in the exercise of official duties. There is no need to go further and provide blanket immunity to those who willfully abuse their public authority through classic acts of extortion simply because the Government benefits from the crime.

3. Petitioners Are Not Entitled To Qualified Immunity.

Petitioners have not contested that their conduct, if undertaken without authorization and on behalf of a non-governmental employer, would constitute "a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402. *See* Pet. App. 17a. That should end the matter. For no reasonable official could have believed that Congress authorized him to file false criminal charges against respondent, invade his property, harass his guests, and undertake a pattern of selective enforcement of agency regulations to coerce him into giving the Government his property without just compensation. Nor could any reasonable official believe that he could lawfully engage in extortion on behalf of the Government, when he clearly could not do so on behalf of any other employer or third party. No court has ever so held and petitioners have cited nothing that could make such a belief plausible.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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